No. 01 -3 JUN 26 2001

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In The

Supreme Court of the United States

GREGORY FLINT TAYLOR,
Petitioner,

v.

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Whether a criminal defendant is denied his Sixth Amendment right to effective assistance of counsel from the individual or cumulative effect of the following deficiencies of trial counsel: (1) failure to object to inculpatory hearsay which allows in evidence an unconfronted statement contrary to the overall theory of the defense; (2) failure to interview potential defense witnesses and thus learn about witnesses who could rebut the key prosecution witness and who could rebut evidence of the acts of a dog which the prosecution contended circumstantially incriminated the defendant; (3) failure to object to prejudicial and improper remarks during the prosecutor's closing argument; and (4) failure to investigate the case sufficiently to give advice to the defendant about whether he should testify in his own defense?

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which adopted the reasoning of the District Court's Order denying habeas corpus relief for a state prisoner.

OPINIONS BELOW

The Judgment and unpublished Opinion of the U.S. Court of Appeals for the Fourth Circuit filed March 28, 2001, appears at Appendix A of the Petition. The unpublished Order denying habeas corpus relief by the U.S. District Court for the Eastern District of North Carolina, which the Fourth Circuit opinion upheld, appears at Appendix B. The order of the highest state court to review the case, the Supreme Court of North Carolina, filed March 4, 1999, appears at Appendix C to the Petition and, being an Order denying certiorari. The Superior Court of Wake County, North Carolina, upon a hearing on Petitioner's Petition for Motion for Appropriate Relief, entered a written Order denying the Motion on December 10, 1998, which appears at Appendix D.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit filed its Order upholding the District Court's denial of habeas corpus relief on March 28, 2001. This Court has jurisdiction to review the judgment of the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States, which reads: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defense."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, Section 1, which reads: "...nor shall any State deprive any person of life, liberty, or property, with-out due process of law...."

STATEMENT OF THE CASE

The Petitioner Gregory Flint Taylor is a North Carolina prison inmate serving a sentence of life imprisonment imposed on April 19, 1993, in Wake County (N.C.) Superior Court for first degree murder. Petitioner appealed his conviction to the North Carolina Supreme Court, which on September 9, 1994, filed an opinion finding no error. Petitioner filed a Motion for Appropriate Relief in the Superior Court of Wake County, which Motion, as amended, was denied and dismissed after an evidentiary hearing by Order filed on December 10, 1998, and served by first-class mail on counsel for Petitioner on December 16, 1998. Thereafter, Petitioner filed a Petition for Writ of Certiorari in the North Carolina Supreme Court for review of the denial of his Motion for Appropriate Relief. The Supreme Court denied his Petition for Writ of Certiorari on March 4, 1999. Petitioner sought issuance of a writ of habeas corpus by the District Court. By a Judgment and accompanying Order entered September 12, 2000, Chief District Judge Malcolm J. Howard, granted the Respondent's motion for summary judgment and dismissed the Petitioners' habeas corpus petition. Petitioner then appealed to the Court

of Appeals for the Fourth Circuit, which on March 28, 2001, found no error in the Order of the District Court and dismissed Petitioner's appeal.

REASONS FOR GRANTING THE WRIT

I. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND THE COURTS BELOW DECIDED THIS CASE CONTRARY TO DECISIONS OF THIS COURT AND FOUND FACTS WHICH ARE NOT ONLY UNSUPPORTED BY THE RECORD BUT REFUTED BY THE RECORD.

A. THE FAILURE OF TRIAL COUNSEL TO OBJECT TO INADMISSIBLE HEARSAY IN VIOLATION OF PETITIONER'S RIGHTS TO CONFRONTATION OF WITNESSES WAS UNREASONABLE AND PETITIONER WAS PREJUDICED AS A RESULT.

Appellant Gregory Taylor originally retained James Blackburn, formerly U.S. Attorney for the Eastern District of North Carolina, to represent him in the defense of his first degree murder indictment. Because of disciplinary action by the North Carolina State Bar, Mr. Blackburn was unable to defend Mr. Taylor at trial. Michael Dodd of the Wake County Bar and R.L. Adams, who was in Mr. Blackburn's former law firm, represented the Petitioner at trial.

Trial counsel Mr. Dodd and Mr. Adams sat by without objecting when the prosecuting attorney asked a State's witness, Detective Johnny Howard, about an

interview he had with one-time co-Defendant, Johnny Beck. This clearly hearsay testimony was unreasonably found by the state court and by the District Court (Order at p. 11) to be reasonable trial tactics by trial counsel and not to prejudice the Respondent. The exchange occurred as follows:

> Q: Did you have occasion yourself personally to question Johnny Beck?
> A: Yes, I did.
> Q: During the course of that questioning did you have occasion to ask Mr. Beck if he saw any other person near or around the body at any time on the evening of or the early morning hours of September the 26th, 1991?
> A: I did.
> Q: What did he tell you?
> A: He did not.
> Q: He denied seeing this person in the white shorts or red shorts. Did you give him ample opportunity to tell you that that person existed?
> A: Yes, sir, I did.
> Q: And he never mentioned that person to you?
> A: No, he did not.

(T Tr. p. 298) (emphasis added). Beck did not testify at Petitioner's trial.

Trial counsel were manifestly ineffective at trial in failing to object to the above line of questioning because any statement that co-defendant Beck made out-of-court was inadmissible hearsay; and, not only hearsay, the admission of testimony about Beck's out-of-court statements quoted above violated the Petitioner's rights to confrontation of witnesses,

guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

It is manifest from a reading of the trial transcript that the State's purpose for introducing Beck's unconfronted extrajudicial statements was to prove Petitioner lied to the police during a police interrogation of him shortly after the discovery of the body. A tape recording of Petitioner's interrogation was played to the jury, and a transcript of same was introduced into evidence as State's Exhibits 38 and 39. During this interrogation, Petitioner told the interviewing detective that he and Beck saw a body lying where the victim was later found, and that Beck called Petitioner's attention to the fact that someone was standing in the circle (or cul-de-sac) over the victim's body. Without objection, the State was allowed to elicit from Detective Howard that when he and another officer questioned Beck, Mr. Beck stated that he did not see any other person near or around the body as Petitioner had claimed they both saw. (T Tr. p. 298).

The failure of Petitioner's trial counsel to interpose both hearsay and constitutional confrontation-rights objections to the admission into evidence of the out-of-court statements of Beck was clearly ineffective. See, e.g., *Henry v. Scully*, 918 F.Supp. 693, 715 (S.D.N.Y. 1995), *aff'd.* 78 F.3d 51 (2d Cir. 1996) ("counsel's performance is unreasonable" when he fails to object to prejudicial inadmissible hearsay).

The prejudice to Petitioner of his trial counsel's failure to object to the constitutionally inadmissible statements of Beck is overwhelmingly demonstrated by the prosecutor's own argument to the jury:

....[A]t two hundred yards [the Defendant] can tell not only that it is a male standing over her body, this mysterious male but he's either got on a red shirt and white pants or a white shirt and red pants....

And what is more important about that is this: You are Johnny Beck. You know that you are about to get charged with murder, too. You don't know what your codefendant has said or when the police say, did you see anybody else at the scene? Was anybody else there? You don't even mention this man that you have seen standing over the body just as you are leaving. That is--man, they had four and a half hours to get their story straight but they must have missed, somebody missed that part. Either this defendant got too creative or Mr. Beck couldn't remember what he was suppose [sic] to say but there isn't any reason in this world somebody knowing that they are getting ready to be charged with murder, wouldn't say, gosh, yeah, there was this guy that was standing over the body. I told him about it.

You heard me ask the officer, did you ask him [Beck] if anybody else was there? Did you give him a chance? Johnny Beck never mentioned the mystery man. It is a figment of this defendant's imagination.

....[I]t is obvious when you take into context of this evidence that it isn't true. Well, we know he lied to his wife.

(T Tr. p. 571, line 6 through p. 572, line 13) (emphasis added).

In *State v. Bass*, 121 N.C.App. 306, 465 S.E.2d 334 (1996), the Court of Appeals granted a new trial in a first-degree sex offense case where the prosecutor on final argument argued facts excluded under the rape shield law. In the case at bar, the prosecutor argued facts that were inadmissible under the hearsay rule and under the confrontation clauses; in the case at bar these facts were in evidence solely because of defense counsel's deficient and unreasonable failure to object to them. In Bass, defense counsel objected to the argument of the prosecutor and won on appeal; in the case at bar, there was no objection.

In his findings of fact, the State post-conviction judge found the following:

> 33. ...Trial counsel were desirous as part of a trial strategy, to question the detective about the unconscionable manner in which he questioned each defendant in an effort to obtain a confession, (i.e. telling each that the other had claimed that his codefendant had committed the murder.) Further trial counsel wanted the jury to know that inspite [sic] of these tactics that both defendant and codefendant Beck had continued to deny involvement by themselves or their codefendant.

(emphasis added);

> 36. Trial counsel did illicit [sic] testimony in length about the questionable methods used by the detective as well as the defendant's and codefendant's steadfast assertion of innocence despite the use of said tactics.

(emphasis added). See Appendix D.

These findings are unreasonably wrong, and are contradicted by the trial transcript; thus they are not supported by the record before the State court. It is true that Mr. Dodd testified at the post-conviction evidentiary hearing that he was able to elicit testimony from Detective Howard about unconscionable tactics Howard used in his interrogation of the co-Defendant Johnny Beck. Mr. Dodd stated that he "specifically did not object to that [hearsay testimony], knowing it was objectionable, because I had a reason to use that at a later time, and did, in fact, do that at a later time." (MAR- 1 Tr. p. 19-20). At various other times during his testimony, Mr. Dodd stated that he was able to get Detective Howard to admit to using unconscionable tactics with Johnny Beck. (See, e.g., MAR-1 Tr. p. 21-23) ("what I did ask [Detective Howard] about was the same tactics that they used against Johnny Beck that they used against Greg, that is, they lied to Greg and told Greg that Johnny had said that Greg did it, which Johnny had not done, and they did the same thing with Johnny Beck. Told Johnny that Greg had said that he did it when he didn't. They were seeking to obtain a confession from either or both of these people by what I thought to be unconscionable means....that's when this tactic occurred of lying to each of them in trying to get them to make a statement. That's what I wanted the jury to know and that's why, why I did what I did in that regard."); (MAR-1 Tr. p. 25) ("Howard repeatedly admitted that he lied as an interrogation tactic?" "Yes, to both of them."); (MAR-1 Tr. p. 26) ("But I felt if [the jury] knew that the police had consistently lied throughout the case to both people that they felt were principal suspects would be of use to, help to us."); (MAR-1 Tr. p. 30) ("I did what I thought was appropriate based on a trial tactic decision at that time to seize on that, so that he would open the door for me to go back later and bring out the, the other instances of unconscionable misconduct by the police [in interviewing Johnny Beck].").

The State court heard all of the above testimony during the evidentiary hearing, and his findings of fact indicate that he accepted Mr. Dodd's testimony as true. However, the trial transcript shows that Mr. Dodd did not elicit the testimony from Detective Howard, as he claimed he did. (T Tr. pp. 299-352). Mr. Dodd was either genuinely mistaken or intentionally misleading the State court, as a review of the trial transcript very clearly shows. Mr. Dodd did elicit such testimony about Detective Howard's methods of interrogation of the Petitioner Gregory Taylor, but Mr. Dodd admitted he could have done that without letting in the damaging hearsay. (MAR-1 Tr. p. 84). At no point in the trial did Mr. Dodd elicit testimony from Detective Howard regarding unconscionable tactics used by Detective Howard when interrogating Johnny Beck. Thus, the State court's findings #33, #35 and #36 are not supported by the record; they are contradicted by it.

Further, Dodd should have known that no such unconscionable techniques were used in the interrogation of the co-Defendant Johnny Beck. Dodd testified that he "read through every document in the file." (MAR-1 Tr. p. 55). He certainly must have read the transcript of Johnny Beck's interrogation--it was in his trial notebook, with notes written on it. (Beck Interview, pp. 1-28). Dodd must have known, therefore, that Detective Howard used no unconscionable tactics in his interrogation of Johnny Beck, even though he admittedly did when interrogating the Petitioner. Dodd had no reason to think that allowing the hearsay testimony to come in would allow him to question Detective Howard about some techniques that he knew Howard did not even use.

Mr. Dodd did not need the hearsay evidence quoted *supra* to open any doors. Mr. Dodd could have cross-examined Detective Howard about his interrogation techniques regardless of the hearsay testimony, as Mr. Dodd himself admitted in the MAR evidentiary hearing:

Q: But you would agree with me, would you not, Mr. Dodd, that you certainly had the right to ask the detective, even if there was no such person as the codefendant, you could have asked the detective about, about his interrogation technique in front of the Jury?

A: Sure.

Q: As to how he elicited the tape recorded statement?

A: No question about that.

Q: You could have gotten him to admit that he lied to Greg Taylor during the inter- rogation process?

A: Assuming he would tell the truth, yes, and he did tell the truth apparently.

(MAR-1 Tr. p. 84-5). In fact, as discussed above, Mr. Dodd only focused at trial on the unconscionable tactics Detective Howard used in his interrogation of Gregory Taylor. Mr. Dodd admitted in the evidentiary hearing that even "if Johnny Beck had never been mentioned by anybody or even if he didn't exist, if the police in interrogating [Gregory Taylor] lied to him the way they admitted they did," Mr. Dodd could have "brought that out before the jury without any reference to Johnny Beck." (MAR-1 Tr. p. 30).

Further, Mr. Dodd admitted that he "didn't want the jury to hear [about the hearsay evidence] in the first place." (MAR-1 Tr.p. 62). This is wholly inconsistent with Mr. Dodd's assertion that it was part of his trial strategy to allow this evidence to get before the jury. The hearsay evidence does not show unconscionable police tactics--it shows a fatal inconsistency between Petitioner's story and that of co-Defendant, and was actually contrary to Mr. Dodd's stated strategy that he "wanted the jury to know that Johnny's

statement [to the police], with minor exceptions, was perfectly consistent with Greg's." (MAR-1 Tr. p. 22).

But the only part of Mr. Beck's statement which was presented to the jury was the part that Mr. Dodd failed to object to--the part that was in serious conflict with Petitioner's story and in conflict with the theory of the defense.

From the foregoing testimony by Mr. Dodd, it is readily apparent that while his trial strategy did involve cross-examination of Detective Howard to reveal unsavory police interrogation techniques as to his own client, his overarching trial strategy was to obtain a dismissal for insufficiency of prosecution evidence and, failing that, get the last jury argument in reliance on what he perceived as the weakness of the State's case. (MAR-1 Tr. 26-27, 29, & 31). Therefore, to be consistent with and faithful to his proclaimed strategy, Mr. Dodd critically needed to keep out the one glaring inconsistency between the Petitioner's and co-Defendant's statements to the police. Given this, it is clear that allowing the complained-of confrontation violation of Petitioner's rights to occur was inconsistent with and destructive to the overall trial strategy.

In any event, trial counsel's "opening the door" mantra shows a deficient knowledge of the law of evidence. Mr. Dodd did not need to allow the confrontation clause violation to occur as a predicate to questioning the detective about his interrogation techniques with the Petitioner, as Mr. Dodd ultimately admitted on cross-examination. Mr. Dodd's protestations that he allowed the confrontation clause violation to occur is an after-the-fact rationalization to protect his reputation--not a legitimate trial tactic. The record shows this to be true, and the State judge's findings to the contrary are thus an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See also *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). As *Williams* recognizes, "tactics as a matter of

reasonable performance" under the *Strickland* test cannot automatically justify trial counsel's omissions. 529 U.S. at 373, 120 S.Ct. at 1502. A contrary view is manifestly contrary to clearly established law of this Court.

In light of Mr. Dodd's testimony as to his overarching trial strategy, the fatal damage to that strategy, and the evidence through the unconfronted Beck hearsay that Petitioner was lying to the police about Mr. Beck's and Petitioner's seeing a third person near the body, the failure of Petitioner's trial counsel to object to seriously damaging testimony which they readily could have excluded (or set up reversible error by objecting to) clearly satisfies the prejudice prong of the *Strickland* test. The State court's finding of no prejudice is both contrary to and an unreasonable application of *Strickland* within the meaning of 28 U.S.C. §2254(d)(1). *Williams*, *supra*, 529 U.S. at 374, 120 S.Ct. at 1502-3. Thus, the Fourth Circuit's Order below upholding what the State courts and District Court did should be reversed.

B. PETITIONER WAS PREJUDICED BY TRIAL COUNSEL'S FAILURE TO INTERVIEW WITNESSES ESSENTIAL TO PETITIONER'S DEFENSE.

Trial counsel failed to adequately prepare for trial, in that they did not interview witnesses who were essential to Petitioner's defense. Specifically, trial counsel did not investigate the possibility that the testimony of Ernest Andrews could be shown to be untrue. Trial counsel failed to interview key witnesses who were in the cell with Petitioner and Mr. Andrews at the time Petitioner allegedly made a "jailhouse confession."

The failure to conduct an adequate, proper pretrial investigation to uncover witnesses with knowledge of facts that refute relevant facts testified to by a prosecuting witness is manifestly ineffective within the meaning of *Strickland v.*

Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *Williams v.Taylor, supra*, 529 U.S. at 396, 120 S.Ct. at 1514-15. See also *Hooper v. Garraghty*, 845 F.2d 471 (4th Cir. 1988) (applying *Strickland* to failure to adequately investigate pretrial).

The code of professional responsibility D.R. 6-101 (A) further provides that once a case has been accepted, a lawyer shall not handle a legal matter without adequate preparation in the circumstances. *Via v. Superintendent Powhatton Correctional Center*, 643 F.2d 167, 174 (4th Cir. 1981) (emphasis added). Here, defense counsel had Andrews' statement in advance of trial and knew what his testimony was going to be, when Petitioner allegedly made the "jailhouse confession" (within 24 to 36 hours of being jailed), and what cellblock Petitioner was in when he made the alleged admissions. Yet counsel did nothing to investigate whether there had in fact been such jailhouse admissions by Petitioner or whether there was evidence to refute that there had been.

The crucial role of pretrial investigation is well-recognized. *See, e.g., Rummel v. Estelle,* 590 F.2d 103, 104 (5th Cir. 1979) (pretrial investigation and preparation are the keys to effective representation), *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984) (effective representation hinges on adequate investigation and pretrial preparation [mere appearance of an in-court effectiveness cannot compensate for inadequate pretrial preparation]); *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985) (at a minimum, counsel has the duty to interview potential witnesses and to make adequate investigation of the facts and circumstances of the case. This duty is reflected in the American Bar Standards for Criminal Justice); *Aldrich v. Wainwright*, 777 F.2d 630 (11th Cir. 1985) (failure to conduct meaningful pretrial investigation satisfies first prong of *Strickland* test); *Foster v. Lockhart*, 9 F.3d 722, 726 (8th Cir. 1993) (reasonable performance of counsel includes an adequate investigation of

facts, consideration of viable theories and development of evidence to support those theories).

In the case at bar, the failure of defense counsel to do a proper investigation of the "jailhouse confession" was extremely prejudicial. The failure of defense counsel to discover witnesses who could contradict Andrews was crucial. Andrews was the only witness offered by the State who testified Petitioner admitted to being present when the victim was actually murdered and acting in concert with Johnny Beck. Other than Andrews' testimony about Petitioner's purported jailhouse admissions, the State's case against the Petitioner was purely circumstantial.

Mr. Dodd well in advance of trial was given a copy of Andrews' statement, and "knew essentially what that testimony was going to be." (MAR-1 Tr. p. 32). Mr. Dodd testified that "there would have been no way to find [witnesses to refute Andrews' testimony] unless we knew something about who they were or certainly had a name or something. It would have been, it would have been next to impossible to do that." (MAR-1 Tr. p. 64). Even though Mr. Dodd realized the utility such witnesses would have, he failed to investigate the possibility that there were other former cellmates of Petitioner who could refute the allegations of Mr. Andrews. (MAR-1 Tr. p. 36-7). Years later, post-conviction counsel was able to find two such witnesses--Shane Todd and Paul Eastridge. These two witnesses testified that Petitioner never made statements such as Mr. Andrews claimed he did. Had he done even a cursory investigation of this issue, Mr. Dodd would have been able to find at least these two witnesses, and almost surely more, through jail records.

In his testimony, Mr. Dodd admitted that Petitioner had told him that Andrews was lying. (MAR-1 Tr. p.35). Mr. Taylor gave a list of names to his former counsel, Mr. James Blackburn--a list of approximately ten people whom he remembered being in the cell-block with him. (MAR-1 Tr.

pp. 99-100). This list included the names of Mr. Todd and Mr. Eastridge. Mr. Dodd also stated that he "read through every document in the file" he received from Mr. Blackburn when he took over the case. (MAR-1 Tr. p. 55). Additionally, Petitioner indicated to Mr. Dodd during the trial that he wanted the jailhouse witnesses to testify to refute Andrews. (MAR-3 Tr. p. 95-97). Mr. Andrews testified that there were twelve or fifteen other people in the cell with them. (T Tr. p. 402). Mr. Andrews even testified that "there were several of us setting [sic] around at that time," when Petitioner was talking about some of the facts underlying his charge. (T Tr. p. 403).

The record thus leads to the conclusion that Mr. Dodd was on notice that there were witnesses who might be able to refute Mr. Andrews' testimony. He might have inferred it, as well, from Petitioner's assertion that Andrews was lying, or from Petitioner's assertion that he never told anyone in jail anything about his case. Moreover, Mr. Dodd should have been put on notice when he saw the list of names of cellmates in the file he acquired from Mr. Blackburn. Mr. Dodd has no justification for not investigating further.

The State court's conclusion that "Defendant gave Dodd no indication that there were inmates who could refute [Andrews'] statement" is thus unreasonable in light of the evidence presented in the evidentiary hearing and clear and convincing evidence refutes the foregoing finding by the State judge. As Petitioner's attorney, Mr. Dodd had a professional obligation to investigate all possible avenues of defense available to Petitioner. His failure to do so constitutes constitutionally ineffective assistance of counsel to Petitioner's prejudice. That prejudice is aptly illustrated by the fact that the State dismissed first degree murder charges against the co-Defendant Beck for lack of evidence to prosecute him. The only pre-trial difference between Petitioner and Beck is that the State had a "jailhouse informer"--Andrews--to testify against Mr. Taylor. He was

not in Beck's cellblock and the State therefore had no such evidence against the co-Defendant Beck.

For the foregoing reasons, the State court's post-conviction order was both contrary to *Strickland*, *supra*, and also an unreasonable application of it. *Williams v. Taylor*, *supra*.

C. THE COURTS BELOW MANIFESTLY ERRED IN FINDING THAT TRIAL COUNSEL'S FAILURE TO SECURE AN EXPERT IN CANINE BEHAVIOR TO CONFRONT THE TESTIMONY OF THE STATE'S CANINE EXPERT WOULD NOT HAVE AIDED PETITIONER'S DEFENSE.

Trial counsel were further ineffective for failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert. The failure to conduct an adequate, proper pretrial investigation and to adequately prepare is manifestly ineffective within the meaning of *Strickland*, *supra*, and the other cases cited *supra*. If Mr. Dodd had hired a canine expert, it could have aided him in two respects. First, it would have allowed him to rebut the State's conclusions as to the meaning of the dog's behavior. Secondly, Mr. Dodd could have consulted with a canine expert to better prepare himself to cross-examine the State's canine expert.

In finding #63 (Appendix D), the State court found that trial counsel's failure to use a rebuttal canine expert was not ineffective because the rebuttal expert's testimony could only have shown that the decedent was not in Petitioner's truck, and a State's witness, Ms. Kelly, testified at trial that decedent was in the truck. This finding is arbitrary and erroneous due to an unreasonable interpretation of the facts in light of the clear and convincing evidence in the state court record.

Ms. Kelly did not testify at trial that the decedent, Jacquitta Thomas, was in Petitioner's truck. She testified, instead, that she saw the Petitioner and co-Defendant with a girl named "Jackie," whom she unequivocally stated was not the decedent. (T Tr 290-93). Finding #63 is thus based on a clearly unreasonable interpretation of the facts in the State trial record; an error also made by the State Supreme Court on direct appeal. *State v. Taylor*, 344 N.C. 31, 473 S.Ed.2d 596 (1996).

If indeed Ms. Kelly had testified that decedent was in the Petitioner's truck, it was important that Petitioner undermine such testimony. Defense counsel could and should have put on a canine expert to dispute that evidence, as was done during the evidentiary hearing of the Motion for Appropriate Relief. (MAR-2 Tr. pp. 27-95, 122-124).

Again, the State trial court's Order on this issue was contrary to *Strickland*, *supra*, and also an unreasonable application of it to the discrete facts of this case. The District Court was wrong in its failure to so find, and the Fourth Circuit erred in failing to find the District Court erred in this respect.

D. THE COURTS BELOW IN FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THREE PORTIONS OF THE PROSECUTOR'S CLOSING ARGUMENT ON THE GROUND THAT THOSE REMARKS DID NOT PREJUDICE PETITIONER, EVEN THOUGH THE DISTRICT COURT AND COURT OF APPEALS FOUND THAT AT LEAST TWO OF THE REMARKS WERE IMPROPER.

Trial counsel were also deficient and ineffective at trial for failure to object to three portions of the prosecutor's closing argument that were improper. Accordingly, defense

counsel deprived Petitioner of the opportunity for the trial judge to correct these improprieties at trial, and further subjected the Petitioner to a higher standard on appeal--the "gross impropriety" standard. Petitioner did not testify. The improper arguments were as follows:

(A) "Generally in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything."

(B) "The defendant has got to explain something to you."

(C) "It's your duty to speak for the people of the State of North Carolina when there's another side to what Mr. Dodd says and I know y'all will do that even though I can't do it because obviously I'll be sitting there with my turn having come and gone but don't think that I'm not wishing that I had, that I'm not wishing that I had spoken about something that he mentioned when there's another side."

Appellate counsel, who was different from trial counsel, attempted to raise (A) and (B) in the Supreme Court of North Carolina on direct appeal, but that court ruled the above-quoted statements in (A) and (B) were not so grossly improper as to require the trial judge to intervene ex mero motu. *State v. Taylor*, 344 N.C. 31, 473 S.Ed.2d 596 (1996).

The comments quoted in (A) and (B) amount to an unconstitutional comment on Petitioner's election not to testify. Similar comments have been held to constitute reversible error by many federal appellate courts. *See, e.g.*,

U.S. v. Kallin, 50 F.3d 689 (9th Cir. 1995) (error for prosecutor to comment on the defendant's silence); *U.S. v. Hardy*, 37 F.3d 753 (1st Cir. 1994) (prosecutor's comment reversible error because it implied defendant was hiding behind his right to silence); *U.S. v. Sardelli*, 813 F.2d 654 (5th Cir. 1987); *U.S. v. Griggs*, 735 F.2d 1318 (11th Cir. 1984) (prosecutor's comment, "the defendant has not testified about it" held to be reversible error); *U.S. v. Barton*, 731 F.2d 669 (10th Cir. 1984) (prosecutor's comments on failure of defendant to take witness stand held to be reversible error); *U.S. v. Flannery*, 451 F.2d 880 (1st Cir. 1971).

The argument in (C) to the jury invited the jurors to become advocates for the State. It was the jury's duty to serve as impartial judges of the facts. Thus this argument violated rights secured to the Petitioner to an impartial jury guaranteed him by the Sixth and Fourteenth Amendments to the U.S. Constitution. Numerous federal courts have held that such arguments constitute reversible error. *See, e.g., U.S. v. Managhan*, 741 F.2d 1434 (D.C. Cir. 1984), *cert. den.*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985) (prosecutor may not urge jurors to convict a criminal defendant in order to protect community values, preserve order, or deter future lawbreaking); *U.S. v. Barlin*, 686 F.2d 81 (2d Cir. 1982) (prosecutor improperly appealed to the jury's passion and emotion in characterizing its job as the occasion on which jury has a duty to do something about crime); *U.S. v. Hawkins*, 595 F.2d 751 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 910, 99 S.Ct. 2005, 60 L.Ed.2d 380 (1979); *U.S. v. Barker*, 553 F.2d 1013 (6th Cir. 1977).

Had trial counsel properly objected, the Petitioner at least would not have had (A) and (B) decided under the very rigorous "gross impropriety" standard on appeal. As (C) was arguably grossly improper, appellate counsel was deficient and ineffective in failing to raise it on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

Contrary to the Appellate Court's finding, the proof of prejudice is not the shortness of the State's commentary on Petitioner's failure to testify, it is the comments at all, especially where they undermined trial counsel's overarching strategy. In any event, losing the proper standard of appellate review was extremely prejudicial. And, finally, the District Court's failure to view each deficiency in original counsel's performance in sum total, rather than in isolation, is plain wrong under *Williams v. Taylor*, *supra.*

E. THE COURTS BELOW ERRED IN FINDING THAT PETITIONER WAS FULLY AND ADEQUATELY ADVISED OF HIS RIGHT TO TESTIFY AT TRIAL AND THIS FINDING WAS UNREASONABLE ON THE RECORD OF THIS CASE.

Trial counsel were further ineffective in failing to adequately advise Petitioner on whether he should testify in his own defense.

In the evidentiary hearing, Mr. Dodd testified that:

> We knew we could not put on character evidence for Greg, not because he didn't have good character in particular, but because there was [sic] incidents in his past that would come out to the jury we didn't want the jury to know, incidents of drug activity and alcohol activity and problems at home and convictions we didn't want the jury to know.

(MAR-1 Tr. p. 28-29). When asked by undersigned counsel what it was about Petitioner's past that he did not want the jury to know, Mr. Dodd replied that:

> There were some instances of which I had been told by the prosecutor about some, some in- stances in which he was, some 404(b) type evidence involving cocaine and alcohol and possibly some incidents with his wife that we did not want out in front of the jury. I didn't want anything about problems with his wife or family in front of the jury.

(MAR-1 Tr. p. 48).

Mr. Dodd was clearly not familiar with the facts. He was wrong when he listed the alleged "404(b) evidence" that he thought would be a problem for Petitioner, and the reason he was wrong is that he had not adequately prepared the case. He did not know what prior bad acts, if any, Petitioner had committed which might possibly be introduced to the jury. The fact that he did not know leads to the conclusion that he could not have adequately advised Petitioner whether to testify or not.

Petitioner never told Mr. Dodd that he had assaulted his wife, or anyone else, for that matter. (MAR-3 Tr. pp. 107-08). He never told Mr. Dodd that he had been convicted of any crimes of violence. (MAR-3 Tr. p. 108). The fact is that Petitioner had never been charged with or convicted of any such crimes. Rebecca Taylor, Petitioner's wife at the time in question, testified that Mr. Dodd never discussed the upside or downside of testifying. (MAR-3 Tr. p. 121). She testified she told Mr. Dodd's co-counsel that counsel need not worry about violence toward her by Petitioner. (MAR-3 Tr. p. 122).

Before this case, Petitioner had never been convicted of anything but traffic offenses, and breaking a window when he was eighteen years old. (MAR-3 Tr. p. 108-09). The traffic violations involved impaired driving and minor traffic infractions. (MAR-3 Tr. p. 109). There were no crimes

involving cocaine or any other drugs, as Mr. Dodd incorrectly stated in the evidentiary hearing. There were no crimes involving violence, as Mr. Dodd incorrectly stated in the evidentiary hearing. When advising a client whether he should testify on his own behalf, it is necessary for the attorney to help him weigh the pros and cons of doing so. The attorney can only do that if he finds out what the pros and cons are. Without this preparation, the attorney's assistance is constitutionally ineffective.

Again, the findings by the state and federal courts below on this issue are contrary to and an unreasonable application of *Strickland*, *supra*, and *Williams*, *supra*, and also unreasonable in light of the factual record in this case. The District Court erred in allowing summary judgment in favor of the Respondents and dismissing Petitioner Taylor's habeas corpus petition; therefore, the Fourth Circuit erred in finding no error by the District Court and in dismissing Petitioner's appeal and in refusing to grant a certificate of appealability.

CONCLUSION

For the foregoing reasons, taken jointly or severally, the above deficiencies by counsel at trial and on direct appear were ineffective under prior controlling decisions of this Court; and the Judgments of the courts below were contrary to the controlling decisions of this Court. For the foregoing reasons, this Court should grant certiorari in this case.

Respectfully submitted this 26th day of June, 2001.

THOMAS FRANKLIN LOFLIN III
Counsel of Record
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P.O. Box 1315
Durham, N.C. 27702

Appendix A

JUDGMENT
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 00-7529
CA-99-149-5-H

Entered: March 28, 2001

GREGORY FLINT TAYLOR,
Petitioner - Appellant,

v.

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents - Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina at Raleigh

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

/s/ Patricia S. Connor
Clerk

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-7529

GREGORY FLINT TAYLOR,
Petitioner - Appellant,

versus

JOE HAMILTON, Secretary, North Carolina Department of Correction; LYNN PHILLIPS, Director of Prisons; MICHAEL BUMGARNER, Superintendent, Nash Correctional Center; MICHAEL EASLEY, Attorney General of North Carolina; STATE OF NORTH CAROLINA,
Respondents - Appellees.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-99-149-5-H)

Submitted: March 22, 2001
Decided: March 28, 2001
Entered: March 28, 2001

Before WILKINS, LUTTIG, and MICHAEL, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Thomas Franklin Loflin, III, LOFLIN & LOFLIN, Durham, North Carolina, for Appellant. Diane Appleton Reeves, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Gregory Flint Taylor appeals the district court's order denying relief on his petition filed under 28 U.S.C.A. § 2254 (West 1994 & Supp. 2000). We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we deny a certificate of appealability and dismiss the appeal on the reasoning of the district court. Taylor v. Hamilton, No. CA-99-149-5-H (E.D.N.C. Sept. 12, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
WESTERN DIVISION

FILED
SEP 12 2000
DAVID W. DANIEL, CLERK
U.S. DISTRICT COURT
E. DIST. NO. CAR.

No. 5:99-HC-149-H

GREGORY FLINT TAYLOR,)
)
Petitioner,)
)
v.) **ORDER**
)
JOE HAMILTON, *et al.*,)
)
Respondents.)

Entered: September 12, 2000

Gregory Flint Taylor, a state inmate, petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Respondents have moved for summary judgment, Petitioner has responded, and the matter is ripe for disposition.

STATEMENT OF THE CASE

On April 19, 1993, Petitioner was convicted following a trial by jury in the Superior Court of Wake County of first-degree murder and sentenced to life imprisonment. His appeal to the North Carolina Supreme Court was denied on September 9, 1994. He subsequently filed a motion for appropriate relief (MAR) in the Superior Court of Wake County and this was denied on December 10, 1998, following an evidentiary hearing. A petition for writ of certiorari was filed in the North Carolina Supreme Court. The petition was denied on March 4, 1999.

During his criminal proceedings, Petitioner was initially represented James Blackburn and R.L. Adams of Smith, Helms, Mullis, and Moore of Raleigh. When Balckburn had to withdraw from the case, Petitioner hired Michael Dodd to represent him and Adams continued to work with Dodd.

STATEMENT OF THE FACTS

The facts, as determined by the Supreme Court of North Carolina, show that Officer Brad Kenan saw a woman's body lying in the street on a cul-de-sac at the end of Blount Street in Raleigh, North Carolina at 7:30 a.m. on the morning of September 26, 1991. The dead woman's clothes were torn and pants were down around her ankles. The officer observed two holes in the victim's head and several cuts between her breasts. The victim was later identified by her finger prints as Jacquetta Thomas. Paraphernalia associated with the use of cocaine and crack cocaine were also found in the cul-de-sac. Petitioner's truck was found stuck at the end of a dirt road which led off the cul-de-sac. When Petitioner returned early that morning to retrieve his truck, the police were investigating the murder.

When Petitioner arrived at the scene, Detective Johnny Howard asked him to go to the police station for questioning. This interview was recorded. Petitioner told the police that he left home in his Pathfinder around 6:00 p.m. on September 25, 1991 and went to a friend's house where he stayed until about 9:30 p.m. He then went to another friend's house where he drank beer and became intoxicated. He then went to Johnny Beck's house around 11:30 p.m. where he smoked cocaine and drank more beer. He and Beck went to Beck's brother's house and stayed from around 1:00 a.m. until about 2:30 a.m., on September 26. Petitioner and Beck bought cocaine and drove into the cul-de-sac where the victim's body was found. He told police he did not see the body when they arrived. He stated that he

and Beck saw the service road and decided to go "four-wheeling" in his Pathfinder. They drove down the service road and became stuck in the ravine where they smoked more cocaine. He and Beck then got out of the truck and started walking north on South Blount Street when Beck saw the body in the cul-de-sac. After they walked further, Beck turned around and said he saw a person standing in the cul-de-sac. Petitioner then turned and saw the person. Beck and Petitioner walked to a busier street where they were picked up by a woman who drove them to a "rock" house. They stayed there using drugs until about 6:00 a.m. The woman drove Beck home and left Petitioner at a gas station where his wife picked him up. Petitioner repeatedly stated that he did know the victim, had not seen her before, and that she had never been in his vehicle.

Eva Marie Kelly testified that she was prostitute living at 419 East Street in southeast Raleigh o September 25, 1991. She stated that she saw a white man, whom she identified as Petitioner, and his black male passenger in her neighborhood that night and during the early morning hours of September 26. According to Kelly, the Pathfinder stopped in front of her house in the evening and she went up to the passenger door and spoke with the black man in the passenger seat. The black man asked if she wanted to get high and party with them. He displayed money and cocaine rocks and there was more cocaine in little plastic bags. Kelly did not get into the vehicle and the two men left.

When Kelly came home later in the evening, a black female named Jackie and one named Whoopie were in the kitchen with the two men she had seen earlier in the Pathfinder. Syringes were on the table and the group was smoking crack. Kelly left with her date, but when she returned she saw Jackie leaving by the kitchen door with the two men. She saw the Pathfinder traveling on Cabarrus Street and recognized it as the one she had seen earlier. She identified Petitioner as the man she saw with Jackie in the

kitchen and leaving with that night. She also identified him as the one driving the Pathfinder.

Ernest Andrews testified that he was in the Wake County Jail when Petitioner was placed in a cell with him. According to Andrews, he and Petitioner had several conversations while they were together. Petitioner told Andrews he was charged with murder. When another inmate asked Petitioner how the victim died, he responded that she died "with a smile on her face." Petitioner later added that she was "cut from ear to ear, throat cut."

William E. Hensley of the City-County Bureau of identification testified that technicians determined that the Pathfinder had been driven through the pool of blood found by the body. He further testified that the vehicle traveled in a northerly direction and circled around to the southwest before going over the curb and south up the gravel service road. Traces of blood were found on the passenger side front fender, passenger side A-frame and on the passenger side front wheel-well liner of Petitioner's Pathfinder. After a *voir dire* hearing, the trial court concluded the evidence that a purebread bloodhound had indicated the scent of the murder victim was in, on, or about the Pathfinder. The jury heard evidence that Officer Andy Currin took the bloodhound, Sadie, to the cul-de-sac and prepared a scent directly from the victim's body. After Sadie was presented with the scent and was commanded to "find," the dog headed southeast in a "zig-zag" manner to the gravel service road leading form the cul-de-sac and toward the Pathfinder. Sadie turned to Officer Currin indicating that the scent had stopped prior to or at the bottom of the embankment. Sadie was taken to the top of the ridge, about thirty feet from the Pathfinder and again given the command to "find." She circled searching for the victim's scent. When she was fifteen or twenty feet from the Pathfinder, she went directly to the driver's door and around to the passenger side door. She jumped both doors. Officer Currin testified that Sadie's actions indicated the victim's scent was in, on, or around the vehicle.

Dr. Deborah L. Radisch, Associate Chief Medical Examiner, testified that the autopsy she performed on the vicitms's body showed cuts and stab wounds. She concluded, however, that the cause of death was blunt force injuries to the head and neck. There was no evidence that the victim was struck by a vehicle. Drug testing revealed a very high concentration of cocaine in the body. The wounds indicated that the victim had been alive in the cul-de-sac and had been killed there.

At the close of the State's evidence and again at the close of all the evidence, Petitioner moved to dismiss the murder charge against him on the grounds that there was insufficient evidence that he committed the crime. Petitioner's motions were denied. Petitioner presented no evidence at his trial.

COURT'S DISCUSSION

I. Taylor's Ground's for Relief

As grounds for relief, Petitioner states: (1) trial counsel were ineffective for failing to object to testimony including out-of-court statements which were inadmissible hearsay; (2) trial counsel failed to adequately prepare for trial, in that they did not interview witnesses who were essential to Petitioner's defense; (3) trial counsel were ineffective for failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert; (4) trial counsel were ineffective for failure to object to the testimony of Eva Marie Kelly, a prostitute, who testified in exchange for sentence concessions by the State in her own case; (5) trial counsel were ineffective for failure to object prosecutor's improper statements in his closing argument; and (6) trial counsel were ineffective for failing to adequately advise Plaintiff about whether he should testify in his own defense.

II. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The party seeking summary judgment must come forward and demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Once the moving party has met its burden, the non-moving party must then affirmatively demonstrate that there is a genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). When making a summary judgment determination, the facts and all reasonable inferences must be viewed in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes limitation on federal review of state court decisions. When reviewing habeas petitions involving claims adjudicated on the merits in state court, federal habeas may be granted only if the state court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." 28 U.S.C. § 2254(d)(2).

In reviewing this case, we first determine that Petitioner's claims were adjudicated on the merits in the State court MAR hearing. Therefore, habeas may be granted only if the standard set forth above is met. Petitioner contends the State court decision on the merits of his claims as presented in his motion for appropriate relief was unreasonable and contrary to federal law.

A state court's decision is contrary to clearly established federal law as determined by the Supreme Court if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has set of materially indistinguishable facts. *Williams v. Taylor*, 120 S.Ct. 1495, 1523 (2000). A state court decision involves an unreasonable application of clearly established federal law if the state court identifies the correct governing legal principle from the Supreme Court's decision but unreasonably applies that principle to the facts of the prisoner's case. *Id.* The Fourth Circuit in *Fisher v. Lee*, 215 F.3d 438, 447 (4th Cir. 2000), in construing *Williams*, pointed out that "'an unreasonable application of federal law is different from an incorrect application of federal law.'" A federal court considering a habeas petition may not therefore issue a writ simply because the court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly, but may do so only if the application is also unreasonable. *Williams*, 120 S.Ct. 1523.

III. Ineffective Assistance of Counsel

The standard upon which claims of ineffective assistance of counsel are reviewed is that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland* the petitioner must first show that counsel's performance was deficient by showing that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. Second, a petitioner must show that the deficient performance prejudiced his defense. *Id.* The second component requires a showing that counsel's errors were so serious as to deprive the petitioner of a fair trial. *Id.*

In reviewing Petitioner's claims of ineffective assistance of counsel, it is important to look at the backgrounds and experience of the attorneys representing him. As noted above, Petitioner was initially represented by James Blackburn and R.L. Adams, from the law firm of Smith, Helms, Mulliss and Moore. The superior court found that Blackburn and Adams requested discovery from the state and enlisted to services of an experienced private detective, Randy Montague to supplement to discovery. (Order denying MAR p. 2). The court also determined that Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case. *Id.* When Blackburn was forced to withdraw, Adams continued to work on the case with L. Michael Dodd who was selected by Petitioner to replace Blackburn. Dodd had practiced criminal law for seventeen years, with his total practice involving the defense of criminal charges for the preceding ten years. *Id.* Dodd had represented more that sixty defendants charged with murder and has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of state and federal criminal law.

For the most, part Petitioner's contentions center around trial counsel's defense strategy. His claims that trial counsel were ineffective for failing to object to testimony including inadmissible out-of-court statements, failing to interview witnesses who were essential to his defense, failing to adequately prepare to confront or cross-examine the testimony of the State's canine expert, failing to object to Eva Marie Kelly's testimony, failing to object to prosecutor's improper statements in his closing argument, and failing to advise Petitioner as to whether he should testify in his own defense, all relate to trial tactics as gleaned form the record. Both Attorney Dodd, in his testimony in the post-conviction proceedings, and Attorney Adams, in his affidavit, contend that their defense strategy was to call no witnesses and leave it to the government to prove its case. Dodd further avers that his failure to object to the hearsay

statements was part of his strategy to point out the improper tactics used by the police to elicit statements from Petitioner and Johnny Beck, his co-defendant. Moreover, he states that he, after consulting with Petitioner and Adams, determined that it would be more to their advantage not to call witnesses in Petitioner's defense in order to preserve the right to have final closing arguments.

Unsuccessful trial tactics, standing alone, neither constitute prejudice nor definitively prove ineffective assistance of counsel. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995), *cert. denied*, 518 U.S. 1009 ((1996). To succeed on an ineffective assistance of counsel claim, Petitioner must overcome the presumption that the challenged action may be considered an appropriate and necessary trial strategy under the circumstances. *Strickland*, 466 U.S. at 689. Whether or not Petitioner consented to trial strategy is probative of the reasonableness of trial counsels' performance. *See Bell*, 72 F.3d at 429.

There is no question concerning the credentials of the attorney's who represented Petitioner. Therefore, the court will first address Petitioner's contention that he was not properly advised as to the pros and cons of his testifying on his own behalf. Trial counsel state that they consulted with Petitioner regarding his right to testify, pointing out the pros and cons of Petitioner's taking the stand. However, Petitioner, in his affidavit states that he was not adequately advised by counsel as to whether he should take the witness stand. The state court, after thoroughly reviewing the evidence presented at the MAR hearing, concluded that there was no credible evidence that defendant was not adequately advised of his right to testify. Petitioner states in his affidavit that counsel's reasons for not allowing him to testify are inaccurate. However, even if the court were to determine that Petitioner was not adequately advised of his right to testify, there is no evidence to show that he was prejudiced as a result. Petitioner has not demonstrated that he could have offered any evidence in addition to that already before

the jury by way of the statements to the police following the incident. Therefore, the state court finding that Petitioner was fully and adequately advised of his right to testify at trial was not unreasonable under the circumstances, nor contrary to federal law as established by Supreme Court in *Strickland.*

Turning to Petitioner's contention that his attorneys were ineffective due to their failure to object to certain hearsay statements made by a co-defendant to the investigating officer. Mr. Dodd testified during the MAR hearing before Judge Farmer, that testimony concerning statements the co-defendant made which were contradictory to Petitioner's statement were hearsay. During his tape recorded interview, Petitioner stated that he and the co-defendant stated that he saw the body lying where the victim was later found, and that the co-defendant had called his attention to the fact that someone was standing in the circle over the victim's body. Mr. Dodd, without objection, allowed the State to elicit testimony from Detective Howard that the co-defendant did not see any other person near or around the body. Dodd claims he did not object and allowed the co-defendant's testimony as a trial tactic, because he wanted to ask the detective about his "unconscionable" tactics used in questioning both the co-defendant and Petitioner. (MAR tr. pp. 18-19.). The superior court rejected Petitioner's claim that trial counsel were ineffective for failing to object to the hearsay testimony of Detective Howard regarding a statement given to him by the co-defendant, Johnny Beck. Rather, the superior court pointed out that trial counsel were aware that Howard's statement would be objectionable hearsay, but as a part of their trial strategy wanted to use this as way to question the detective about the manner used to question each defendant and to show the jury that in spite of the "unconscionable" tactics, both Petitioner and Beck continued to deny involvement in the murder. (Order denying MAR p. 4). The superior court concluded that trial counsel did illicit testimony in length about questionable methods used by the detective and

testimony concerning both defendants' assertions of innocence. Therefore, the court's findings that trial counsel's actions were reasonable and that Petitioner was not prejudice as a result are not contrary to, nor do they involve an unreasonable application of the standard set forth in *Strickland*.

Petitioner-next contends trial counsel was ineffective for failing to adequately prepare for trial because they did not interview witnesses who were essential to his defense. Petitioner specifically argues that counsel did not try to find witnesses who were in the cell with Petitioner and Ernest Andrews, the inmate who testified that Petitioner made a jailhouse confession. In this case, counsel had a transcript of Andrews' tape recoded statement and thus they were aware of the nature of his testimony. Andrew's statement that there were other inmate's present when Petitioner allegedly made the first statement incriminating himself, indicated that there were other potential witnesses who could have possibly refuted Andrews' testimony. In his affidavit, R. L. Adams stated that Petitioner suggested that they have some of the inmates from his cellblock testify. Adams, however, states that this idea was not followed through on because none of the inmates were with Petitioner for twenty-four hours a day and therefore could not testify that it was impossible for Petitioner and Andrews to have dad the conversation. Apparently, Petitioner's current counsel was able to find witnesses who also shared the jail cell with Petitioner when he was first arrested. After reviewing the testimony of the two inmates, Judge Farmer determined that they gave little evidence of value which would tend to refute Andrews' statements. A review of the testimony of the witnesses who supposedly would have aided Petitioner's defense shows that their testimony would have offered little or nothing to rebut Andrew's assertions concerning Petitioner's jailhouse confession. (*See* MAR tr. pp. 3-33). At most, their testimony merely demonstrated that Petitioner never confessed to them. Thus, the court concludes that Petitioner

was not prejudiced by trial counsel's the tactical choice and their decision not to use these witnesses did not amount to profession dereliction.

Petitioner claims that trial counsel's deficiencies in failing to obtain an expert to deal with the bloodhound evidence and to object to tainted identification evidence were prejudicial under the *Strickland* standard. The evidence in question has to do with the testimony concerning the trailing of the victim's scent to Petitioner's vehicle which was stuck near a service road off the circle and the identification of Petitioner by Eva Marie Kelly.

With regard to the bloodhound evidence, the record shows that counsel objected at trial to this evidence and that there was an extensive *voir dire* hearing. Through a suppression motion and cross-examination trial counsel demonstrated the recognition of the legal issues involved in this kind of testimony. Moreover, the evidence provided at the MAR hearing by Jonni Joyce, who at the time was a sergeant with the Zebulon Police Department and a professional canine trainer, shows that such rebuttal evidence would not have aided Petitioner's defense. Instead, this merely served as a look at the evidence in hindsight not as an indication of any deficient performance on the part of trial counsel in dealing with this evidence.

Respondent argues, however, that even if the failure of the attorneys to hire a separate bloodhound expert amounted to ineffective assistance, there was no prejudice because the bloodhound evidence was duplicative. Respondent concludes that the Kelly's testimony placed the victims in Petitioner's presence and in his car shortly before she was killed.

Even so, Petitioner asserts that trial counsel was ineffective for failure to object to the testimony of Kelly who testified in exchange for sentence concessions. He contends the identification was the result of an impermissibly suggestive photo "showup." The state court found, following the MAR proceeding, that "based on the

circumstances of the witnesses' viewing, twice outside at close range and once face to face in the lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive." (Order denying MAR p. 6). This determination by the state court is reasonable in view of the fact that Kelly had at least one good opportunity to see Petitioner when he and his co-defendant called her to his truck, thus establishing that the in-court identification had an independent origin. *See Simmons v. United States*, 390 U.S. 377 (1968).

Finally, Petitioner claims counsel were ineffective for failing to object to prosecutor's improper statements in his closing argument. The allegedly improper arguments were as follows: (1) "[g]enerally, in a homicide, there's two kinds of parties there, the victim who can't say anything, and the perpetrator, who won't say anything;" (2) "[t]he defendant has got to explain something to you;" and (3) "[i]t's your duty to speak for the people of the State of North Carolina when there's another side to what Mr. Dodd says and I know y'all will do that even though I can't do it because obviously I'll be sitting there with my turn having come and gone but don't think that I'm not wishing that I had, that I'm not wishing that I had spoken about something that he mentioned when there's another side." Petitioner contends these comments as found in 1 and 2, violate his right not to be a witness. The court finds that these comments alone, although improper, did not prejudice Petitioner where they were not extensive. Similarly, the court finds that comment 3, which was an isolated comment did not prejudice Petitioner. The court therefore determines that trail counsel was not ineffective for failing to object to the comments at issue.

CONCLUSION

Accordingly, the court finds that the evidence viewed as a whole, does not raise a reasonable probability that the result of Petitioner's trial would have been different were it not for counsel's deficient performance and that Petitioner has failed to demonstrate the existence of genuine issues of material fact. Therefore, the court having found no violations of federal or constitutional laws, Respondent's motion for summary judgment is GRANTED as to all claims raised in Petitioner's habeas corpus petition.

SO ORDERED this 11th day of September 2000.

\s\ _____
MALCOLM J. HOWARD
United States District Judge

I certify the foregoing to be a true and correct copy of the original.
David W. Daniel, Clerk
Untied States District Court
Eastern District of
North Carolina

By \s\ _____
Deputy Clerk

Appendix C

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CRS 71728

STATE OF NORTH CAROLINA
WAKE COUNTY

STATE OF NORTH CAROLINA

v.

GREGORY F. TAYLOR

ORDER DENYING MOTION FOR APPROPRIATE RELIEF

Entered: December 10, 1998

This cause coming on to be heard and being heard before the undersigned Superior Court Judge presiding upon the defendant's Motion for Appropriate Relief filed April 21, 1997 and defendant's Motion to Amend Motion for Appropriate Relief filed sometime on or after November 2, 1998. The hearing took place in part on April 3, 1998, May 15, 1998, and was finally completed on August 21, 1998. The Court having read and reviewed all documents filed of record in the official court file of the above captioned case including the trial transcript, having received the sworn testimony of witnesses offered by defendant, having received exhibits; and having read the written arguments of counsel for the State and defendant, makes the following:

FINDINGS OF FACTS

1. The defendant, Gregory F. Taylor, was personally present in open Court during the entirety of the hearing with his retained counsel, Thomas F. Loflin III; the State was represented by Assistant District Attorney, R. Thomas Ford.

2. The hearing was held in the absence of a jury.

3. The Court had the opportunity to see and observe each witness who testified at the hearing and to determine what weight and credibility to give the testimony of each witness.

4. The defendant's Motion for Appropriate Relief alleged the conviction at trial in the above captioned case was unconstitutionally obtained in that defendant's trial counsel, L. Michael Dodd and R.L. Adams rendered ineffective assistance of counsel.

5. The defendant's Motion for Appropriate Relief alleged ineffective assistance of counsel in the following respects:

    a) by failing to object to Detective Johnny Howard's testimony regarding his interview with co-defendant, Johnny Beck.

    b) by failing to properly investigate the case prior to trial and with specific reference to jail inmates who could contradict the making of a "jailhouse confession" by the defendant testified to by a witness at trial, Ernest Andrews.

c) by failing to object to the testimony of Eva Marie Kelly identifying defendant as one of the men decedent was with the night of her death.

d) by failing to object to certain final arguments of the prosecutor.

6. The defendant's Motion to Amend Motion for Appropriate Relief further alleged ineffective assistance of counsel in the following respects:

a) by failing "to advise defendant adequately regarding his right to testify."

b) by failing "to call an expert witness to explain the actions of the police dog in a manner consistent with innocence."

7. Defendant was arrested and charged with the murder herein on September 26, 1991 and shortly after his arrest defendant employed James Blackburn (herein after referred to as Blackburn) and R.L. Adams (herein after referred to as Adams) to represent him to the conclusion of the trial of the matter.

8. Blackburn and Adams requested and received "full discovery" from the State.

9. Blackburn and Adams enlisted the services of an experienced private detective, Randy Montague, to supplement the discovery in investigation and preparation of their case; Mr. Montague, a former Wake County Sheriff's Department detective, spent from fifty to eighty hours searching for and interviewing potential witnesses and attempting to develop evidence advantageous to the defendant.

10. Defendant's family also employed a separate detective, Larry Morrisey to aid in developing exculpatory evidence and defendant's counsel were also privy to his findings.

11. Blackburn and Adams spent approximately four hundred and fifty hours in investigation and preparation of the case.

12. Prior to February 1993, Blackburn who had lost his privilege to practice law in North Carolina was forced to withdraw and his firm, Smith, Helms, Mulliss and Moore, agreed that they would allow defendant to replace Blackburn with the attorney of defendant's choice and the firm would pay the replacement. Adams would also remain on the case as attorney for defendant also because he was familiar with the case.

13. In February, 1993 defendant considered several attorneys to replace Blackburn as a trial lawyer and chose L. Michael Dodd (herein after referred to as Dodd) an attorney defendant had earlier contacted immediately after his arrest for advice in this matter.

14. Dodd, a Wake County attorney, had practiced criminal law for seventeen years; one hundred percent of his practice had involved the defense of criminal charges for one preceeding ten years.

15. Dodd had qualified for and been placed upon Wake County Bar's list "4A", those certain attorneys approved to serve as "first chair" for indigent defendants in capital cases.

16. Dodd has represented in excess of sixty defendants charged with murder, more than half of which were death penalty cases.

17. Dodd has been qualified by the North Carolina State Bar Board of Legal Specialization as a specialist in the field of State and Federal criminal law.

18. Upon his being retained to represent defendant at the trial of the case with Adams who continued with the defense team, Dodd, spent almost everyday for a period of time until he had reviewed every document in the file, including the original discovery information, additional investigation by private detectives and the original attorneys as well as any work product the attorneys had produced.

19. During the one hundred and twenty plus hours of trial preparation Dodd found the work done by Blackburn and Adams to have been very thorough and complete.

20. Dodd and Adams went to Chapel Hill, North Carolina and personally interviewed Dr. Deborah Radisch, the State's pathologist and medical examiner in preparation for trial.

21. Dodd and Adams employed former Chief Medical Examiner of North Carolina, Dr. Page Hudson and met with him for a day going through the medical examination discovery so they would be better prepared to cross examine Dr. Radisch and to develop certain arguments involving that evidence.

22. Early during the involvement of Mr. Dodd in the case, the attorneys determined and agreed that they considered the State's case was weak in areas and that the best trial strategy would be to not aid the State in producing evidence of any element of the crime and to attempt to focus first on those weaknesses and failings to procure nonsuit. Further Dodd and Adams felt it was best trial strategy to preserve final arguments, if possible, should the case get past nonsuit.

23. Dodd and Adams discussed this strategy with defendant as it was being devised and the defendant concurred with that strategy.

24. Dodd, based on all his contact with defendant, found defendant to be an intelligent young man who appeared to understand the legal arguments and factual representations being made to him.

25. Trial of the matter commenced on April 13, 1993 and was concluded on April 19, 1993 and the defendant, who was free on bond, was represented at the trial by Dodd and Adams.

26. The defendant was convicted of first degree murder and sentenced to life in prison from which judgment he appealed directly to the North Carolina Supreme Court.

27. The Supreme Court of North Carolina reviewed the case and on September 9, 1994 filed an opinion in which the Court found that the defendant had received a fair trial free from prejudicial error.

28. Thereafter defendant through his attorney, Thomas Loflin, III filed this Motion for Appropriate Relief alleging the six separate manifestations of ineffective assistance of counsel heretofore set forth.

29. The closing arguments of the prosecutor which defendant contends in this motion amounted to an unconstitutional comment on defendant's election not to testify were reviewed directly by the North Carolina Supreme Court which found that these same arguments, when taken in contest, "did not amount to an impermissible comment on defendant's failure to testify."

30. The arguments were not objectionable as impermissible comments by prosecutor on defendant's failure to testify and counsel failure to object thereto was not erroneous.

31. The third argument defendant complained of, when taken in context, is a paraphrase of the jury's duty as set forth in North Carolina Pattern Instructions - Criminal Section 101.35 and is not improper or objectionable and counsels failure to object thereto was not erroneous.

32. Defendant contends that trial counsel were ineffective in that they failed to object to hearsay testimony by Detective Howard regarding a statement given to him by the codefendant Johnny Beck.

33. Trial counsel were aware that such a statement would be objectionable hearsay. Trial counsel were desirous as part of a trial strategy, to question the detective about the unconscionable manner in which he questioned each defendant in an effort to obtain a confession, (i.e. telling each that the other had claimed that his codefendant had committed the murder.) Further trial counsel wanted the jury to know that inspite of these tactics that both defendant and codefendant Beck had continued to deny involvement by themselves or their codefendant.

34. Trial counsel had discussed the case with Randolph Riley, attorney for codefendant Beck, and had been told that he would not allow Beck to testify for the defendant.

35. Trial counsel purposefully did not object to the hearsay statement of Beck when prosecutor attempted to illicit same because they realized it "open the door" for them to obtain evidence of codefendant's continued denial of the guilt of either defendant even in the face of the unconscionable tactics used by the police in their attempts to obtain a confession.

36. Trial counsel did illicit testimony in length about the questionable methods used by the detective as well as the defendant's and codefendant's steadfast assertion of innocence despite the use of said tactics.

37. Defendant contended that trial counsel were ineffective for failure to fully investigate the validity of the testimony of former jail inmate Ernest Andrews.

38. Mr. Andrews who had been an inmate in the jail with defendant immediately after defendant's arrest testified that defendant made a somewhat inculpatory statement to him in jail.

39. Defendant's counsel became aware of this statement through discovery and thereafter sent Detective Montague to a prison unit in eastern North Carolina to determine if Andrews would testify and if he did, what he would say.

40. Andrews statements to Montague made trial counsel doubt that he would testify.

41. In Dodd's discussions with defendant while preparing for trial, defendant told Dodd he did not make the statement and that Andrews was lying. Defendant gave Dodd no indication that there were inmates who could refute the statement. Dodd instead prepared to cross examine Andrews about his ulterior motives and his extensive criminal record for crimes involving moral turpitude.

42. Defendant called two former inmates to testify at the hearing on the Motion for Appropriate Relief and that they, too, were in jail with defendant immediately after his arrest. They, Shane Todd and Paul Eastridge, both with extensive an serious criminal backgrounds, testified that although they heard defendant discuss the circumstances of his arrest, they never heard him make an inculpatory statement. These witnesses had given information about the version of the incident (murder) that defendant had given, each of them from which a detective had drawn affidavit. The affidavits are somewhat in conflict with each other as to the events defendant reported.

43. Todd and Eastridge testified that they were in "E" block of the Wake County Jail during the relevant time; which cell block composed of six four-man cells and that there were many others sleeping on the floor of the crowded cell block. Each testified that they had no idea to whom defendant spoke during periods of time.

44. Little evidence of value, if any, tending to refute the statements of Ernest Andrews was elicited from these inmate witnesses who defendant described as the people who knew him best while he was in jail at that time.

45. Defendant would have had to relinquish last argument to gain the testimony of these questionable witnesses and would have gained very little, if anything, toward damaging the State's case.

46. Defendant suffered no prejudice by trial counsel's adherence to the trial strategy of securing last argument by not calling these two career criminals in order to obtain the testimony they provided.

47. Defendant contended that trial counsel were ineffective for failing to object to the testimony of Eva Marie Kelly, a prostitute identifying the defendant as being one of the men that was with the decedent the night she was killed.

48. Ms. Kelly's trial testimony revealed that on the night of the murder, the defendant and codefendant approached her in defendant's vehicle and offered her money and cocaine to go "party" with them. She saw them and spoke to them from within arms reach. Later she had a conversation and confrontation in her

lighted kitchen with the defendant, codefendant and "the girl Jackie" (the decedent) over the fact that they were using cocaine in a manner which frightened the "john" whom Ms. Kelly had with her. Later she saw these three leave in defendant's truck.

49. The day after the murder police canvassed the area of Ms. Kelly's home showing pictures of defendant, codefendant, and defendant's automobile and asking if anyone had recognized the vehicle and/or the defendant and codefendant. Ms. Kelly viewed the photographs before being given information regarding the crime and she told the officer that she had seen them and under what circumstances. Ms. Kelly did not originally tell the police of the confrontation inside her home.

50. This form of neighborhood canvassing and searching for possible witnesses by police officers did not amount to an impermissibly suggestive identification procedure so as to taint the witnesses' in-court identification of defendant. Further, based on the circumstances of the witnesses' viewings, twice outside at close range and once face to face in lighted kitchen and the certainty of her identification only a short time after seeing the defendant would have allowed her identification even if the original photo viewing was suggestive. This is so especially in light of the fact that defendant's own statement to police placed him in this neighborhood with the codefendant, in the automobile in question at the time the witness named.

51. The in court identification of the defendant by the witness Kelly was not objectionable and should have been allowed even if and objection had been lodged.

52. Defendant was not prejudiced by trial counsels' failure to so object.

53. Defendant alleged that trial counsel were ineffective because they failed to adequately advise the defendant regarding his right to testify.

54. Trial counsel had developed a dual trial strategy to both avoid providing any witness or evidence from which the prosecution might garner evidence of any element of the crime and also to preserve last argument if possible. Defendant was fully informed of this strategy and had approved this strategy. Trial counsel was of the opinion that defendant should not testify after the State's evidence in furtherance of both strategies.

55. At the close of the State's evidence trial counsel met with defendant to let him decide if he would testify in the trial. Defendant had been personally present through the entirety of the State's case, including his lengthy statement to police in which he explained his vehicle being at the scene, explained his presence there, and vehemently denied any involvement in the death by himself or codefendant. Defendant knew his trial testimony would only repeat that evidence.

56. Trial counsel believed that ultimately the decision as to whether defendant testified in any criminal case was solely that of the defendant. Trial counsel advised defendant that in their opinion he should not testify. After fully discussing the situation with trial counsel and trial counsel going over everything that had happened in the case to that point with defendant, defendant informed them that he agreed and still felt that he should not testify.

57. There is no credible evidence that defendant was not adequately and fully advised of his right to testify at trial nor that he was coerced in any way into his decision not to testify.

58. The defendant alleges that trial counsel were ineffective in that they failed to call an expert witness to explain the actions of the police dog in a manner consistent with innocence.

59. At trial the State called former police officer, Andy Currin who had been a canine handler for the Raleigh Police Department at the time of the murder who had taken a pedigreed bloodhound named "Sadie" to the murder scene. "Sadie" was "keyed" on the scent of the victim and given the command to "find". "Sadie" eventually "trailed" to the defendant's vehicle which was some distance away and out of sight. There "Sadie" gave indication that the scent was present in or on the vehicle.

60. Trial counsel objected to this testimony at trial and an extensive voir dire hearing was had. Trial counsel at that time demonstrated that they had recognized the evidentiary legal issues brought about by the unusual way the bloodhound was used and were prepared to challenge its validity and probative value.

61. The State prevailed in the hearing and the canine evidence was admitted over defendant's counsel's objection. The North Carolina Supreme Court reviewed the canine evidence extensively and found it to have met the tests of admissibility pertaining to such evidence and therefore properly admitted.

62. However trial counsel were successful in challenging the weight this evidence should have with the jury in cross examination of Currin by getting him to admit that he was skeptical of the validity of the process he was asking "Sadie" to perform. He was concerned to the point that he had expressed his feelings to his superiors that the dog was not trained for what she was being asked to do.

63. Prior to the time the defendant could have called an expert in rebuttal of the canine evidence, Eva Kelly, the prostitute had already testified that defendant and codefendant had attempted to get her in the vehicle and that later she had seen the decedent in the vehicle, which was all the canine evidence could possibly indicate, (i.e. that decedent had been in or around the vehicle.)

64. Defendant was not prejudiced by trial counsels' failure to call a rebuttal "canine witness" and counsels' preservation of last argument.

65. The Court has assessed trial counsel's performance with effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsels' challenged conduct, and to evaluate the conduct from counsels' perspective at the time. The Court has evaluated counsels' performance on the whole.

Based upon the foregoing facts, the Court makes the following:

CONCLUSIONS OF LAW

1. The trial preparation and performance of defendant's counsel, L. Michael Dodd and R.L. Adams was not deficient and was well above an objective standard of reasonableness and counsel made no error so serious that said counsel was not functioning as "counsel" guaranteed under the Sixth Amendment.

2. That in regards to said trial, defendant was not prejudiced by the performance of counsel and defendant was not deprived of a fundamentally fair trial, the result of which was reliable.

3. Defendant's conviction was not obtained in violation of the Constitution of the United States or the Constitution of North Carolina in any manner asserted in his original Motion for Appropriate Relief or as amended.

4. Defendant was tried upon a valid Bill of Indictment and had a fair and impartial trial; none of his constitutional or other legal rights were denied or violated in any respect before, during or after his trial.

5. Defendant is imprisoned by virtue of a legal and final Judgment of a Court of competent Juristriction and he is not unlawfully restrained of his liberty; that the time that defendant may be legally detained is not expired, and that the Defendant should be remanded to the custody of the North Carolina Department of Corrections.

6. Defendant's failure to assert any other grounds for relief at the hearing herein should be subject to being treated in the future, and pursuant to G.S. 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that defendant might hereafter file in this matter.

7. The Motion for Appropriate Relief (as amended) that his conviction be set aside and that he be granted a new trial and other relief should be denied.

Based on the foregoing findings of fact and conclusions of law, it is now, therefore,

ORDERED that:

1. The Motion for Appropriate Relief (as amended) filed herein and dated April 21, 1997 and the prayer for relief therein is hereby in all respects denied.

2. Defendant is remanded to the custody of the North Carolina Department of Corrections immediately to complete service of his sentence as provided by law.

3. Defendant's failure to assert any other grounds for relief at the hearing herein shall be subject to being treated in the future, and pursuant to General Statute 15A-1419, as a bar to any and all other claims, assertions, Petitions, or Motions that he might hereafter file this matter.

4. Copies of this Judgment shall be forwarded by the Clerk of Superior Court of Wake County to the Defendant, counsel for the Defendant, Thomas R. Loflin III, the Secretary of the North Carolina Department of Corrections; and the District Attorney, Tenth Judicial District.

Entered out of term and out of session with the consent of the Defendant, his counsel, Thomas F. Loflin III, and the Assistant District Attorney.

This the 10th day of December, 1998.

/s/ _____
Robert L. Farmer
Judge Presiding

Appendix D

No. 482A93-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(State v Gregory Flint Taylor)

STATE OF NORTH CAROLINA

v

GREGORY FLINT TAYLOR

From Wake
(91CRS71728)

****

ORDER

Upon consideration of the petition filed by Defendant in this matter for a writ of certiorari to review the order of the Superior Court, Wake County, the following order was entered and is hereby certified to the Superior Court of that County:

"Denied by order of the Court in conference, this the 3rd day of March 1999.

s/ Wainwright, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of March 1999.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

\s\ Carol B. Templeton
Assistant Clerk

Copy to:

Mr. Thomas F. Loflin, III, Attorney at Law, For Taylor
Mr. William N. Farrell, Jr., Senior Deputy Attorney General, For State
Mr. C. Colon Willoughby, Jr., District Attorney
Mr. John M. Kennedy, Clerk of Superior Court
Mr. Ralph A. White, Appellate Court Reporter
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